No. 15,930

United States Court of Appeals

For the Ninth Circuit

ERNEST PICKENS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

Appellant was tried to a jury in the District Court, Third Judicial Division, District of Alaska, for violation of Section 65-4-3 ACLA 1949. The jury found defendant guilty of manslaughter, a lesser included offense. Defendant was sentenced on December 31, 1956, by the trial Court to a term of four years imprisonment, with two years of the sentence suspended. Execution of said sentence has been stayed pending outcome of the present appeal. Jurisdiction is conferred on this Court by Title 28 USCA 1291.

STATEMENT OF FACTS.

A. Pleadings.

The grand jury for the Third Judicial Division, District of Alaska, brought an indictment against

appellant and two other defendants charging them with the murder of one Jack McCann in the second degree. The grand jury charged a violation of Section 65-4-3 ACLA 1949. Prosecution followed upon the indictment.

B. The Facts.

On or about April 14, 1956, a Saturday evening, defendant William C. Golley was in the company of victim Jack McCann. They were riding in Golley's automobile. Golley stopped and picked up defendant Fitzhugh and defendant-appellant Pickens. They all four rode a short distance. The car stopped. They all got out. Appellant Pickens grabbed the victim's hat and together with co-defendant Fitzhugh, taunted the victim. Appellant, who was in an intoxicated condition, swung at the victim in a menacing manner. His swing was awkward and it missed the victim. Defendant Fitzhugh then began to beat the victim about the head with his fists. The victim fell to his knees but got up again. The victim walked a few yards and fell down. The victim died as a result of the blows inflicted on him. The deceased did not strike or offer to strike any of the defendants or the appellant-defendant.

After the beating, the defendant Fitzhugh and defendant-appellant Pickens left and met each other at a local bar. The victim was taken to the police station and then to the hospital where he was pronounced dead.

QUESTIONS INVOLVED.

The points of error relied upon by the appellant may be grouped under the following headings:

1. Error in the Court's Instructions.

2. Misconduct of the Prosecutors.

3. Error in the Court's refusal to grant various motions made by defendants.

These points were raised in the trial Court through objections and motions by the defendant. There is one assignment of error, however, that is raised here for the first time. That is error number five. The objection to the instruction on the subject of aider and abettor was raised in the trial Court, but on a ground different from that raised by defendant on appeal.

ARGUMENT.

The Government will argue defendant's assignments of error in the order listed by defendant in his brief. Defendant specifies seven assignments of error on pages 9 to 13. He argues them on pages 14 to 37 inclusive.

ERROR NUMBER ONE.

Pages 9 and 14, Defendant's Brief.

INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT.

There is evidence showing that defendant-appellant Pickens was in the company of defendant Fitzhugh prior to and after the altercation with the deceased.

There is further evidence that appellant and defendant Fitzhugh taunted the deceased and that during the taunting appellant struck at or toward the deceased. (Pages 541; 571-2-3; 578-9; 581; 598-9; 607-8; 625; 652-3; and 956-7-8 R.) Defendant Fitzhugh proceeded at once to pummel the deceased and the evidence indicates that the deceased expired as a result of blows inflicted upon him. Appellant was an aider and abettor of defendant Fitzhugh and there was sufficient evidence to warrant convicting him of the crime of manslaughter.

In *Mobley et al. v. State,* 85 NE 2d 489, Supreme Court of Indiana (1949) the Court said actively to countenance and support the doing of a criminal act by another is to encourage it within the statute permitting one who aids or abets in the commission of a felony to be prosecuted as a principal. In the *Mobley* case a mother and her boy friend were charged with beating her child to death. They were convicted. She appealed. The Court said:

> "Even if the jury had not believed that violence by the mother caused or helped to cause the child's death, it reasonably could have found that she aided and abetted Fagan in causing it . . . It is true that mere presence of an accused at the time and place of the crime alleged is not sufficient to make such accused guilty, but if from the facts and circumstances surrounding the defendant's presence at the time, and from defendant's conduct it appears that the defendant's presence did in fact encourage someone else to commit the act, guilt may be inferred."

The Court added that

> ". . . the trier of facts may consider failure of such person to oppose the commission of the crime in connection with other circumstances and conclude therefrom that he assented to the commission of the crime, lent his countenance and approval thereto and thereby aided and abetted it."

In *State v. Williams,* 33 SE 2d 880, Supreme Court of North Carolina (1945) the two defendants both shot twice at deceased. Deceased was hit by one bullet. He fell at the firing of the fourth shot. Both defendants were convicted. The defendant who fired shots one and two appealed. The appellant maintained that:

1. There was no evidence he fired the fatal shot and

2. No evidence of any conspiracy to kill deceased.

The Court said that it was true that no conspiracy was shown, but added that it was not necessary. The Court further stated that even if the fatal bullet was not fired by the appellant, yet his presence under the particular circumstances of the case sufficed to make appellant an aider and abettor. The circumstances were that appellant was a friend of the actual killer, that his presence was an encouragement and a sign of protection to the killer. The Court said that the appellant could be an aider and abettor as a matter of law, and it was for the jury to decide. The difference between the *Williams* case and the present one is that fists were used by the appellant in the latter,

whereas a gun was used by the appellant in the *Williams* case. In addition, the appellant Pickens, in the present case, may have been drunk.

In *McKinney v. Commonwealth,* 243 SW 2d 745, CCA Kentucky (1940) the Court stated that it was not essential that there should be a pre-arrangement or a mutual understanding or concert of action; but in the absence of these, it is essential that one so charged should in some way either by overt act, by expression of advocacy or sympathy, encourage the principal in his unlawful acts. In *People v. Sink et al.,* 30 NE 2d 40, Supreme Court of Illinois (1940), Sink and another had each struck the victim a blow. The victim died. Both were tried and convicted of manslaughter. Both appealed and said that there was no evidence that the blow they struck caused the death. The Court said there was sufficient evidence and added further (page 43):

> "If the evidence had shown one defendant struck the blow that caused a particular injury and such injury caused death, that would not avail the other defendant anything, for under the circumstances he would be deemed to be an accessory and by virtue of the statute, liable as a principal."

Gooch v. United States, 82 F 2d 534, CCA 10 (1936) recognizes the principle that an act of one perpetrator is imputed to all who are aiders and abettors even though the specific criminal result is not intended by the other party. The intent on the part of Pickens was to commit an unlawful battery upon the deceased. Pickens had begun by taunting the deceased. He was

joined by Fitzhugh in that taunting. Pickens had a tussle with the victim. (R. 571-2-3.) Pickens swung at him although he missed. Fitzhugh continued the affray.

Neither appellant Pickens nor Fitzhugh need have had the intent to kill the victims. They need only have had the intent to commit an unlawful battery upon him and they need only have acted together to accomplish the battery. The jury could very well find that Pickens' taunting of the victim and his subsequent swing at him would encourage and spark Fitzhugh's attack. The situation at the scene was tense. Pickens' attack upon the victim, though awkward, was sufficient to ignite Fitzhugh's temper and give him the courage to attack the victim. It was Pickens' intent to do violence to the victim. His drunkenness was not sufficient, according to the evidence, to deprive him of any intent to commit a battery, but apparently it was sufficient to prevent him from committing a successful battery upon the victim. Pickens' and Fitzhugh's unlawful conduct was the proximate cause of the victim's death. The jury finding that they committed manslaughter is supported by the evidence.

The Government agrees that mere presence at the scene of a crime does not make one an aider and abettor. There must be facts and circumstances which indicate, beyond a reasonable doubt, that the bystander either conspired with the actual perpetrator of the crime to commit the crime, or that he encouraged the perpetrator in the commission of the

crime or that he participated in the actual commission of the crime. In the present case, the evidence, if believed, does show that appellant was an aider and abettor.

ERROR NUMBER TWO.
Pages 9 and 29, Appellant's Brief.

MISCONDUCT OF THE PREVAILING PARTY.

The statement of an Assistant United States Attorney in her voir dire examination of jurors concerning appellant's reputation was improper. It should not have been made. However, it was not prejudicial. In fact, defense counsel (R. 127) withdrew his Motion for Mistrial and substituted an objection. The instruction which the Court gave to the jury (R. 127-8) that they were to pass upon the case from the evidence only, and not the statements of counsel, cured the error. The prosecutor's remarks did not disparage the defendant's character or reputation in such manner that instructions by the Court could not cure the error.

The effect of the course of conduct of the prosecutor is much the same on voir dire as in opening statement. The opening statement is even more important in that it is directed to the jury and not to an unsworn panel. Yet misconduct by the United States Attorney in mentioning the accused's character in opening statement was held not to be error in several cases. In the case of *Myres v. United States,* 174 F 2d 329, CAA 8 (1949) the defendant was prosecuted for violation of the income tax laws. In the

opening statement the Assistant United States Attorney told the jury as follows:

> "I am going to show you that the defendant was cheating his dying partner."

The District Court sustained an objection to that statement and instructed the jury to disregard it. The Court of Appeals said (page 339):

> "The statement of counsel should not have been made. The defendant was not charged with cheating his partner but with having deliberately attempted to cheat the United States. The prompt action of the District Court prevented the improper argument from ripening into prejudicial error."

In the case of *McFarland v. United States,* 150 F 2d 593, CCA D.C. (1945) the Court held that the prosecutor's opening statement suggesting that the defendant had used fictitious names earlier in his life and that he had had a criminal record was not such misconduct as to warrant reversal. The evidence in that case did not even bear out the prosecutor's improper remarks. In the case of *Foley v. United States,* 241 F 587, CCA 8 (1917) the prosecutor made a remark concerning the reputation of the defendant in his opening statement. The Court of Appeals held that while improper, it did not warrant a reversal of the case.

While the voir dire remarks of the prosecutor were improper, they were not of such grave nature that an instruction from the Court could not cure the effect

that the comments had upon the jury. The Court did give such instruction.

ERROR NUMBER THREE.
Pages 9 and 32, Appellant's Brief.

MISCONDUCT OF THE PREVAILING PARTY.

The prosecutor's statement in final argument characterizing appellant Pickens and Fitzhugh as "a couple of bar room bullies spoiling for a fight and looking for one" is not error. It was an accurate description of what their conduct was at the time of the crime. It did not touch upon their reputation or character. In the case of *Percy William Herman v. United States,* 220 F 2d 219, CCA 4 (1955) the prosecutor, in final argument, referred to the defendant in a fraud case as a "living fraud" and a "living lie." The Court said the characterization of the defendant, on the basis of the evidence before the jury, was so accurate as to admit of no justifiable criticism. In *United States v. Markham,* 191 F 2d 936, CCA 7 (1951) the prosecutor during final argument in a narcotics case, referred to the defendant as "a trafficker in human misery." The Court said such a reference was proper in view of the evidence. In *United States v. Freeman,* 167 F 2d 786, CCA 7 (1948) the Court said that the District Attorney may speak harshly about the defendant's conduct if the facts warrant it. In the present case, the facts did warrant what the prosecutor said about the appellant.

ERROR NUMBER FOUR.
Pages 9 and 34, Appellant's Brief.

MISCONDUCT OF THE PREVAILING PARTY.

The prosecutor's remarks about Mr. Fitzhugh's hands cannot be interpreted as a comment upon the failure of either Fitzhugh or the appellant to testify in the trial. (R. 1321-2.) The comment referred, indirectly, to the condition of defendant Fitzhugh's hands at the time of the homicide and not at the time of the trial. Pickens' name wasn't even mentioned by the prosecutor in connection with this assignment of error.

ERROR NUMBER FIVE.
Pages 10 and 35, Appellant's Brief.

ERROR OF THE COURT IN HIS ORAL INSTRUCTIONS WITH RESPECT TO THE MEANING OF THE WORDS AID AND ABET.

Counsel for appellant Pickens did not object to the mere oral illustration of the meaning of the words "aid" and "abet" by the trial Court for the benefit of the jury. Pickens' objection at that time (R. 1426) was on the failure of the Court to instruct properly on the meaning of the words "aid" and "abet". Defendant's brief (page 36) raises a new point not raised at the time of the trial. Defendant must raise the objection at the time of trial or he will be deemed to have waived it. *Morissey v. United States,* 70 F 2d 729, CCA 9 (1934) and *Hammond v. United States,* 246 F 40, CCA 9 (1917). Further, the fact that the jury had deliberated several hours before the definitions of the words "aid" and "abet" were given is

of no consequence. In the instruction to the jury the Court merely defined the legal meaning of two words. The Court's definition of these words was correct. He did not qualify or explain his instruction to the jury.

ERROR NUMBER SIX.
Page 6 only, Appellant's Brief.

ERROR OF THE COURT IN HIS INSTRUCTION NUMBER FIVE.

Defendant, in his brief in Argument, makes no reference to this point and the Government assumes that there is no argument on it. The instruction was a correct statement of the law and not at all prejudicial to the defendant-appellant.

ERROR NUMBER SEVEN.
Pages 7 and 37, Appellant's Brief.

ERROR IN REFUSAL TO GRANT THE MOTION OF THE DEFENDANT PICKENS FOR A SEPARATE TRIAL.

Alaska law is silent on the matter except for one statute which reads as follows:

> Title 66-9-22 ACLA 1949, *Conviction of One or More Defendants.* "That upon an indictment against several defendants any one or more may be convicted or acquitted." (CLA 1913, Section 2166; CLA 1933, Section 5227.)

Rule 14, Federal Rules of Criminal Procedure, governs in this case. The defendant does not indicate why a separate trial should have been granted. He states on page 37 of his brief that a separate trial would have avoided confusion, but he does not indicate where confusion in the trial did in fact occur. The

mere fact that a possibility of confusion exists does not warrant refusal on this ground. (*Opper v. United States,* 348 U.S. 84, CCA 6 (1954). Also in *Schockley v. United States,* 166 F 2d 704, CCA 9 (1948) the Court stated that it is within the sound discretion of the trial Court to grant or refuse separate trials for several defendants. In the present case, the trial Court did not abuse his discretion in the matter.

CONCLUSION.

There was sufficient evidence to warrant submission of the matter to the jury. Whether defendant-appellant Pickens' conduct did in fact aid and abet defendant Fitzhugh in killing the victim was a matter of fact to be decided by the jury. They decided that Pickens was in fact an aider and abettor and that the degree of homicide was manslaughter.

There was no prejudicial error committed at the trial. The verdict of the jury and judgment of the trial Court should be sustained.

Dated, Anchorage, Alaska,
August 19, 1958.

Respectfully submitted,

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